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WASTE MANAGEMENT:

THE ENVIRONMENTAL PROTECTION ACT

and

THE ENVIRONMENTAL ASSESSMENT ACT

A Public Consultation Paper Prepared for
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WASTE MANAGEMENT; THE ENVIRONMENTAL PROTECTION ACT; AND THE ENVIRONMENTAL ASSESSMENT ACT

INTRODUCTION

This report explains the two main pieces of provincial legislation which govern approvals for waste management in Ontario - the ***Environmental Assessment Act*** (EAA) and the ***Environmental Protection Act*** (EPA).

Briefly, ***the Environmental Assessment Act*** applies to undertakings by the Ontario government, its agencies and municipalities. The proponent or person who carries out or proposes to carry out an undertaking that is subject to the EAA is forbidden from proceeding unless an environmental assessment of the undertaking has been submitted to the Ministry of the Environment, the assessment has been accepted by the Minister and approval to proceed has been granted. For the purpose of this Act, "environment" includes not only the natural environment, but "the social, economic and cultural conditions that influence the life of people or a community."

The ***Environmental Assessment Act*** requires that early in the planning process, the proponents conduct a study to determine the likely environmental effects of the undertaking and reasonable alternatives. There must also be opportunities for the public to provide input and comment on the proposed undertaking and its alternatives, including whether or not the undertaking should proceed.

Currently, the EAA does not apply to most private projects, although private energy-from- waste (EFW) projects and incineration facilities handling 100 tonnes or more of waste per day were made subject to the Act in March 1987. The Act can apply to other private sector undertakings either at the request of the private industry or if the Provincial Cabinet passes a regulation designating that undertaking to be subject to the EAA.

The ***Environmental Protection Act*** applies to both public and private proponents. This Act focuses upon the proposal itself, its nature and site, and does not deal with the planning process leading up to the proposal, nor with the consideration of alternatives. An EPA hearing generally deals with the environmental and health aspects of a single proposed site, basic safety and other site-specific issues. EPA approval is still required after EAA approval, before a project can begin.

The similarities, differences and relationships between the ***Environmental Assessment Act*** (EAA) and the ***Environmental Protection Act*** (EPA) insofar as they relate to waste management, are described in more detail below.

LET'S CONSIDER THE DETAILS

Q: What are the purpose and scope of the EAA and EPA statutes?

A: The ***Environmental Assessment Act*** was created in 1975 to provide a regime that would encourage good environmental planning. The purpose of the EAA is stated to be "the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment."

The EAA accomplishes this purpose by requiring that wherever a project ("undertaking") is proposed by the public sector or, in an increasing number of cases, the private sector, a study of the effects on the environment and the relative advantages and disadvantages of the undertaking and its alternatives (an "environmental assessment") must be submitted to the Minister of the Environment. "Environment" is broadly defined, and includes not only the natural environment, but also "the social, economic and cultural conditions that influence the life of people or a community." The Minister or the Environmental Assessment Board must then decide whether to accept the environmental assessment and approve the undertaking.

The purpose of the ***Environmental Protection Act,*** on the other hand, it to "provide for the protection and conservation of the natural environment" (i.e., the air, land and water of Ontario). The EPA accomplishes this task through a series of anti-pollution provisions. The EPA includes a number of prohibitions against the discharge of contaminants into the natural environment, as well as providing the Ministry of the Environment with a range of "tools" to enforce these prohibitions (including various orders and prosecution). In addition, the EPA contains a number of licensing provisions, including broad approval powers over all matters of waste management.

Q: How does the ***Environmental Assessment Act*** regulate waste management in Ontario?

A: The EAA applies to most public sector (including municipal) undertakings respecting waste management. It also applies to such private sector undertakings as the Cabinet may from time to time designate. The current Minister of the Environment has stated that most private sector waste management undertakings, including waste incinerators and landfills, will as a rule be designated.

An undertaking is defined in the EAA as an "enterprise or activity, or a proposal, plan or program in respect of an enterprise or activity." This definition is broad enough to cover not only specific landfills, for instance, but also Waste Management Master Plans and other programs for future waste management.

A person who proposes to carry out an undertaking is known as a proponent. A proponent may not proceed with a waste management undertaking until the Minister or the Board has accepted the environmental assessment and given approval to proceed.

In an environmental assessment, a description of the purpose of and the rationale for the undertaking must be provided. More significantly, a proponent must document how and why the alternatives to the undertaking and the alternative methods of carrying out the undertaking were rejected in favour of the one eventually chosen. One alternative to every undertaking is always the option of doing nothing at all. In other words, each proponent must establish a need for the undertaking, although this is not explicitly stated in the EAA.

The EAA requires a balancing of the advantages and disadvantages to the environment of the undertaking and each of the alternatives to the undertaking and the alternative methods of carrying out the undertaking. It is not necessary to discover a perfect alternative, only to follow a procedure in weighing and trading off advantages and disadvantages that can be readily understood by subsequent readers of the assessment.

Following the assessment of the alternatives, and the selection of the preferred alternative (the undertaking), the environment that may be affected by the undertaking must be described; the potential effects of the undertaking on the environment evaluated; and mitigating and corrective or remedial measures established.

Q: How does the ***Environmental Protection Act*** regulate waste management in Ontario?

A: Part V of the EPA applies to both public and private sector proponents in the waste management industry. Until the EAA was passed in 1975, the EPA was the only major piece of legislation governing waste management in Ontario. While the EAA now requires a proponent to engage in a process of good environmental planning before defining an undertaking and submitting an environmental assessment for the approval of the Minister or the Board, a Certificate of Approval (i.e., a licence) is still required under the EPA before a waste management undertaking can be started.

In determining whether a Certificate of Approval should be issued, the Minister or the Board must consider whether the proposal may create a nuisance; is not in the public interest; or may result in a hazard to the health or safety of any person.

Q: What are the requirements for public consultation under the EAA?

A: As a matter of Ministry of the Environment (MOE) policy, one of the key features of successful planning under the EAA is consultation throughout the planning process with affected parties. These affected parties include not only government reviewers -- the wisdom of seeking pre-submission advice from them is obvious -- but also members of the public and public interest groups with an interest in the undertaking. The logic behind consulting with these latter groups is less obvious, but equally well founded. The wide definition of the "environment" in the EAA includes social and cultural aspects. Clearly, one of the best ways to determine and limit social and cultural effects is to provide for mutual understanding of the undertaking between the affected public and the proponent.

Q: What are the requirements for public consultation under the EPA?

A: Because the EPA was designed as a statute for establishing environmental standards and governmental supervision of compliance with these standards, rather than as a planning statute, the above policy respecting consultation with the affected public does not apply to applications for Certificates of Approval. Depending on the circumstances, however, consultation may be appropriate and is often carried out.

Q: What is the procedure for getting an EAA approval, and is there a public hearing?

A: Once a proponent has completed its studies, it prepares an environmental assessment document and submits it to the Minister of the Environment. The Minister then requests that a review be conducted by the various government ministries and agencies. Once this review is complete, the public is invited to

comment on the environmental assessment and the government review. If a member of the public so requests, a hearing may (in the discretion of the Minister) be held before the Environmental Assessment Board. In some cases involving environmental assessments which provide an inadequate base for making a decision, the Minister may order that further research, study or reports be completed.

Parties to an Environmental Assessment Board hearing may include the proponent, any of the various Ministers and agencies of the Ontario government, municipalities, industry associations and private individuals. The proponent expands on the case it already has established in writing in its environmental assessment document. The other parties may elect to call evidence, or simply to cross-examine the witnesses called by the proponent. At the conclusion of the hearing, the Board will have before it not only the written environmental assessment, but also testimony and further documentation which will likely amplify, explain and, in some cases, amend the original environmental assessment. In effect, the transcript and exhibits become part of the environmental assessment.

At this point, the Board is in the same position the Minister would have been if there had been no hearing: the Board must either accept, amend and accept, or refuse to accept the environmental assessment. If it does not accept the environmental assessment, the proponent goes back to the drawing board. If the environmental assessment is accepted, either in whole or in amended form, the Board or the Minister (whichever is making the decision) must then determine whether to approve the undertaking and, if so, subject to what conditions, if any.

Following a decision by the Board, the Minister, with the approval of the Provincial Cabinet, is permitted to amend or completely change the decision or to request that the Board hold a new hearing.

Q: What is the procedure for getting an ***Environmental Protection Act*** approval, and is there a public hearing?

A: Unlike the procedure under the EAA, there is no formal requirement in the EPA that a document be submitted with an application. However, an applicant for a Certificate of Approval must submit sufficient information to allow the Ministry or the Board to make a decision. The practical effect of this is that substantial documentation is almost always submitted with an EPA application.

The review of an EPA application is usually limited to MOE staff. Although no formal government review document must be written, it is often the case that a comprehensive set of comments is prepared by MOE staff.

At an EPA hearing, the parties will include the applicant; the Director; the relevant municipality(ies); the owners of land upon which the applicant proposes to locate the waste management system or waste disposal site; and any other party as determined by the Board.

The applicant presents whatever evidence is necessary for the Board to determine the above issues. As in an EAA hearing, the other parties may call their own contradictory evidence or simply cross-examine the applicant's witnesses. At the end of the hearing, the Environmental Assessment Board will decide whether the Certificate of Approval should be issued and, if so, subject to what conditions, if any. The Director then implements this decision. Appeals of a Board decision may be made to the Cabinet or the courts.

Q: Are "need" and "consideration of alternatives" issues in the EPA hearing as they are in the EAA hearing?

A: There is no specific requirement in the EPA that an applicant consider alternatives to the proposal for which the Certificate of Approval is being sought. Similarly, the approving authority (whether it is the Director or the Environmental Assessment Board) only has jurisdiction to deny, approve, or approve with conditions the proposal as submitted: there is no jurisdiction to approve alternatives to the proposal.

The short answer is therefore that there is no onus on the applicant to establish that the proposal is better than the alternatives to it or better than the alternative ways of carrying it out. However, some decisions of the Environmental Assessment Board have said that if an applicant cannot show there is a need for the proposal, it would not be in the public interest to subject any person to the hazards, nuisance or cost of the proposal, no matter how slight. In other words, if there is no benefit to the project, any cost is too high to be in the public interest.

Similarly, it might be argued that if a party in opposition to the application could show that the alternatives available were clearly superior to the one chosen by the applicant, the Board might be able to conclude that choosing an inferior alternative is not in the public interest. Clearly, though, an applicant is under no obligation under the EPA to assess all alternatives to the proposal as part of its case.

It should be noted that the Board's jurisdiction to use the public interest issue as a basis for these inquiries is not entirely clear and has not yet been tested in the courts.

Q: Do waste recycling, re-use and reduction programs require approvals under the EAA or the EPA?

A: That depends on the specific activities being carried out. A "waste management system" is defined in the EPA to mean "all facilities, equipment and operations for the complete management of waste, including the collection, handling, transportation, storage, processing and disposal thereof, and may include one or more waste disposal sites." Therefore, a 3R's program falling within this definition would be subject to the EPA and also to the EAA, as potentially having an effect on the environment as defined in those statutes, conversely, a program which simply required people to be more selective about what they threw out in the trash would probably not require approvals under either of these statutes.

Q: What's the bottom line: is one system better than the other?

A: No. There are some differences between the two statutes: the EPA's definition of the "environment" is more narrow than the one in the EAA; and applicants under the EPA are not explicitly required to consider the need for (or alternatives to) their projects, as they would be under the EAA. However, both statutes contain mechanisms for ensuring that if a project is to be approved, conditions can be attached to the approval requiring that any nuisances and hazards be minimized and that the public interest be protected.

COMPARISON OF EAA AND EPA FOR WASTE MANAGEMENT UNDERTAKINGS*

ENVIRONMENTAL ASSESSMENT ACT	V.	ENVIRONMENTAL PROTECTION ACT

FOCUS

. "front end" planning . consideration/evaluation of alternatives (technologies/processes/sites) . detailed decision analysis (rationale) supporting the selection of the preferred alternative (undertaking) from among others considered	. permits to implement and operate a specific facility (detailed technology at a particular site)

DEFINITION OF "ENVIRONMENT"

. "broad" definition . proponent to consider potential effects on social, natural, cultural, economic, technical and land-use planning components and the interrelationships among them for the undertaking and its alternatives	. "narrow" definition . proponent to consider the potential effects on the natural environment (air, land, water, and plant and animal life) of the specific undertaking . includes transportation and noise effects

LEVEL OF DETAIL

- sufficient detail to allow approval of the preferred alternative (undertaking)
- will normally involve some site-specific assessment
- site-specific and detailed technical analysis of the proposal

PUBLIC/GOVERNMENT REVIEWER INVOLVEMENT

- during pre-submission consultation (PSC) (MOE policy)
- during government review of the EA submission
- formal public involvement occurs during minimum 30-day public review period upon completion of the government review and during optional EAA or Consolidated hearing (EAA and other statutes)
- usually, PSC with MOE prior to submission of Part V EPA application
- public input on application encouraged at the PSC stage
- other agencies (in addition to MOE) may be involved in reviewing the application
- formal public involvement occurs before the hearing Board during mandatory EPA or Consolidated hearing (EPA and other statutes)

DECISION ON APPROVAL

- under EAA and Consolidated hearing, approval is an EA Board and joint Board decision
- the decision of the Consolidated hearing Board may be appealed to Cabinet and Cabinet may amend or rescind the Board decision within 28 days
- if no hearing is required, the Minister makes a decision on whether to approve together with Cabinet. This decision on approval is final.
- under EPA, EA Board makes decision. The decision of the EA Board may be appealed to Cabinet within 30 days of the decision. Cabinet may amend or rescind the Board decision or require the EA Board to hold a new hearing.
- Consolidated hearing process is the same as with the EAA

* Source: *Introduction to Waste Management Planning and the Ontario Environmental Assessment* (1989) p. 5.

REFERENCE MATERIAL

Environmental Assessment Act, 1980. *

Environmental Protection Act, 1980. *

Consolidated Hearings Act, 1981. *

*Available from: Ontario Government Bookstore
880 Bay Street
Toronto, Ontario
M7A 1N8

In Toronto: 965-6015
In Other Communities: 1-800-268-7540
In Area Code (807) Zenith: 67200

Guidelines and Policy on Pre-Submission Consultation in the EA Process. 1987

Guidelines on Making Application for an Exemption under the Environmental Assessment Act. 1988

Interim Guidelines on Environmental Assessment Planning and Approvals. 1988
(under preparation)

The Role of the Review and the Review Participants in the EA Process. 1987

EA Update (a bi-annual publication of the Environmental Assessment Branch containing articles and a listing of projects).

A Citizen's Guide to Environmental Assessment, 1988.

A Proponent's Guide to Environmental Assessment, 1988.

Introduction to Waste Management Planning and the Ontario Environmental Assessment Act (Re October 1989)**

**Available from: Environmental Assessment Branch
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Toronto, Ontario
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(416) 440-3450